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No. 505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ROBERT WOLCOFF, SANFORD BURTON WOLCOFF, PAT MANNO, and LARRY FREEDMAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioners' Reply Brief

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It is with no fear of contradiction that the defense submits to this court that the very important questions presented by this record has been purposefully evaded in the brief in opposition.

The first question was:

> "1. Did not the government intrude on petitioners' right to counsel by placing an informer, disguised as a co-defendant in their midst?"

We have carefully read the brief of the United States in opposition, and never, never once, do they address themselves to that question.

The second question was:

> "2. When trial counsel's judgment not to call a witness was influenced by statements made by the prosecutor during the trial (but not recorded), that the witness had been threatened, did not wish to speak with defense counsel outside the presence of the prosecutor and was hostile—all of which was after trial,—denied by the witness by affidavit (in fact he maintains he had been coerced by the prosecutor into coming to Chicago from California, was met at the airport by agents of the government, held a virtual prisoner of the government for five days, and would gladly have testified for the defense had he been contacted)—can conviction under such circumstances stand?"

To this the government answers:

> "The court of appeals was not the proper forum in which to raise for the first time a claim that statements made by the prosecutor on the record in open court were deliberately false. If petitioners thought they had a basis for a motion for a new trial, they did not need the permission of the court of appeals to make the motion under Rule 33, F.R. Crim. P." (Its Brief, page 13)

These petitioners moved for a remand of the case (App. 10-28) for authority for the trial court to take the evidence of the newly discovered basis. The government in its answer ignores the clear mandate of Rule 33 as follows:

> "If an appeal is pending the court may grant the motion [for new trial] only on remand of the case."

The second question, too, was artlessly evaded.

The third question was:

> "3. When the defense maintains it was intimidated by remarks of the prosecutor made during the trial but not recorded, does failure to comply with the mandatory provisions of the Court Reporter's Act, thus preventing effective appellate review, require a new trial?"

This is answered by a footnote on page 12 of the government's brief in opposition, wherein it states that failure to comply with the court reporter's act is excusable, because no one claimed that the statement of the prosecutor was incomplete at the time. The statement of the prosecutor is in the appendix.

> "Mr. Molenof: May it please the Court, we have a witness under subpoena from Los Angeles by the name of Hy Handwerker; we may use this witness and we may not use this witness. It all depends upon the circumstances.
>
> "However, your Honor, we do have reliable information that this witness was contacted by Burton Wolcoff in behalf of his defense with a view to developing a defense in his behalf.
>
> "Now, inasmuch as some effort has been made in that direction we will go on record now as saying that we will make this witness available to the defense at any time they want to talk to him for whatever purpose they want to talk to him concerning; however, if at the conclusion of this case there has been no effort to talk to him or an expression of desire for the purpose of developing him as a witness, we will ask the court to release him at that time.
>
> • • •
>
> "Mr. Molenof: Well, I am asking that statement for this purpose, sir, inasmuch as an attempt has been made to contact him for a specific purpose. I don't think that he would be available to any of the defend-

ants at this time and so I just wanted to make the announcement that we will make him available." (Appendix to Writ of Certiorari, pages 23-24.)

It should be quite obvious from the motion (App. 10-28) that "the substance of this conference was [not] set forth on the record." This is yet another of the examples of the evasions to avoid very substantial questions presented to this court in a hope that the flow of business at this time will cause the substantial question to be submerged by the presence of work accumulation.

We note that the trial attorney has not and does not now support by affidavit that that constituted the whole of the "off the record" remarks that are the basis of the question presented.

The fourth question was:

"4. When a defendant is prohibited from presenting a defense to the jury because of the objection of a co-defendant that the other's defense would be prejudicial to him and where the defendant offering the evidence had moved for severance, has he not been deprived of a fundamentally fair trial in violation of the Sixth Amendment?"

The government's answer is that the argument is without substance, for the proffer did not tend to establish a defense to the charge of conspiracy. How does the Solicitor General know that? What is the clairvoyance singular to him as to what in the minds of the jury would negative wilfulness and intent?

The fifth question was:

"5. When the government's principal witness and charged co-defendant testified that he has been made no promises nor does he have expectations of leniency or consideration from the government, and yet seven-

teen months have passed and he has not been called for trial, nor has he changed his plea of not guilty, are not the necessary implications that he gave false evidence on trial, known to the prosecutor, and allowed by the prosecutor to go uncorrected, so that the jury would not know the extent of his interest, such as to require a new trial?"

To this question the government gives its short answer.

"The short answer is that Hartman's non-prosecution by no means shows that he was promised immunity in exchange for his testimony. It is not uncommon for a prosecutor to arrive at an independent decision, in the exercise of his discretion, not to prosecute an individual who has testified for the government." (Gov. Brief, page 9)

It is again significant that the brief in opposition submits to this court what *could* have been the reasons for Hartman's non-prosecution, but never says or contends these are the actual reasons. Surely the true information and incentives are available.

* * *

It is significant in the brief-in-opposition that under the statement of facts, the references are almost exclusively to the testimony of the government informer, signifying how really important to the government's case was this witness, and how devastating to the defense. It is further significant that the government's argument dwells on the defense counsel never asking the substance of the communication between the informer and a defendant *in the presence of the jury.* It is significant that it argues, in effect that the defendants not taking the stand "established" the veracity of the informer. It is significant that, while the defendants made the basis for their motion orally, "they never submitted in formal fashion. . . .". We are

unaware of any requirement that motions have to be submitted "in formal fashion". It was our understanding that the purpose of the Court Reporter's Act, which was violated in this case, obviated such necessity.

It is significant that it argues that petitioners never made any attempt to challenge the volunteered statements of the prosecutor, made in the course of their asking for a hearing which they were denied. If that wasn't a challenge, what was?

This petition presents very serious questions on whether proper and honorable procedures have been employed by the government in seeking the conviction of its citizens. We submit the evasiveness of the brief-in-opposition is a clear indication that, in the overzealous quest for conviction, criminal justice was abandoned.

We respectfully request this court to issue its writ of certiorari to review the judgment of the Seventh Circuit in this cause, to the end that convictions, if secured, be secured without contrivance by agents of the United States, to the end that dignity and fairness be not abandoned for purposes of expedition.

Respectfully submitted,

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